

**STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE SERVICES**

Before the Commissioner of Financial and Insurance Services

**Office of Financial and Insurance
Services,**

Petitioner,

v

**Case No. 05-456-L
Docket No. 2005-189**

Ozell C. Wells,

Respondent.

For the Petitioner:

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For the Respondent:

**Ozell C. Wells
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**Issued and entered
this 9th day of August 2005
by Linda A. Watters
Commissioner**

FINAL DECISION

The Administrative Law Judge (ALJ) issued a Proposal for Decision (PFD) dated June 22, 2005. He reported that the Staff failed to attend that hearing. There was, therefore, no evidence offered to prove the allegations against the Respondent. Accordingly, he recommended that the Commissioner dismiss this matter with prejudice.

The Staff filed exceptions.

The factual findings in the PFD are in accordance with the preponderance of the evidence and the conclusions of law are supported by reasoned opinion. The PFD is attached, adopted, and made part of this final decision.

Missing the hearing was not harmless error. The ALJ and court reporter were in attendance. The Respondent and a representative of the Family Life Insurance Company were present. The Respondent has a Southfield address and probably traveled to attend the hearing. In all likelihood, the Respondent spent time preparing for the hearing.

The Staff had a right to file Exceptions to the PFD. The ALJ did not specify a time for filing them. The Hearings Coordinator prompted the Staff to make its filing within the customary time frame, which in this case would have meant filing by July 12, 2005. Instead, the Staff delayed until July 22, 2005, to make its one-page filing.

In its Exceptions, the Staff made no serious attempt to explain or justify its failure to attend the hearing. It devoted only one sentence to this issue:

That due to clerical error the new hearing date of June 13, 2005 was not recorded on the Enforcement Section's hearing calendar and Staff was, accordingly, unaware of the hearing date.

In the PFD, the ALJ identifies statutory provisions and rules that justified going ahead with a hearing in the absence of the Staff and that were a basis for deciding that the complaint should be dismissed with prejudice. In seeking the remand of this matter, the Staff identified no authority upon which to base setting aside the PFD.

Neither the Insurance Code of 1956, as amended, the Administrative Procedures Act of 1969, as amended, nor the agency's insurance hearing procedures rules address setting aside a

PFD based upon failure to attend the hearing. In such circumstances, it is customary to look to Michigan court rules for guidance.

MCR 2.612(C) specifies grounds for relief from judgment:

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

Excusable neglect was examined recently in *Saffian v Simmons*, 2005 WL

1588205 (Mich App), issued July 7, 2005:

It is clear that the court was unpersuaded by defendant's assertion that he had a reasonable excuse for failing to timely answer the summons and complaint. Viewing the record, we find no basis for ruling otherwise.

It is undisputed that defendant was served with the summons and complaint on September 7, 2001. Twelve days later, on September 19, 2001, defendant's employee allegedly faxed the summons and complaint to the insurance carrier. However, defendant's phone records showed no charge for a long distance call on the alleged date of the fax. There was no contact with the insurance carrier to advise it of the summons and complaint, other than the alleged fax, and there was no follow-up to determine whether the fax was received. The insurance carrier had previous notice of the lawsuit because it was provided with the statutory notice of intent to file a claim in March 2001. Considering the facts upon which the court acted, an unprejudiced person cannot say that there is no justification or excuse for the court's ruling. *Id.* at 228.

Thus, whether or not the fax was sent, the defendant did not take other steps that would have gotten important information to the insurance carrier. It appears the defendant did not show due care with respect to the pleadings.

In the instant matter, the Staff did not state the nature of the clerical error nor did it explain how this amounted to “excusable neglect” in missing the hearing. This is all the more significant because the only information in the contested case file about this is

the Proof of Service issued by the State Office of Administrative Hearings and Rules.

The Proof of Service states that the Order Granting Adjournment--with its new date for hearing--was sent by Inter-Departmental mail to the attorney for the Staff.

Overall, failing to attend the hearing, failing to promptly file Exceptions, and failing to ground the Exceptions in particular facts and in arguments showing “excusable neglect” show a pattern of carelessness. Cumulatively, they warrant following the ALJ’s recommendation that this matter be dismissed with prejudice.

In closing, after the issuance of a Notice of Hearing, the Commissioner must set aside her role as consumer advocate and fully embrace her role as impartial decision maker. Dismissing a matter involving alleged false information in a producer application is disturbing. Nonetheless, it is commonplace for the Staff to seek and obtain defaults against producers for their failure to follow procedures or their failure to attend a hearing. A balanced approach toward enforcing procedures and time frames supports the ALJ’s recommendation.

II ORDER

Therefore, it is ORDERED that this matter is dismissed with prejudice.